No. 17304

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION,

Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF RESPONDENT HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION

SWEENEY, IRWIN & FOYE
By: PETER W. IRWIN
639 South Spring Street
Los Angeles 14, California

Attorneys for Respondent

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JURISDICTIONAL QUESTION

Respondent agrees that the facts of this case raise no question as to jurisdiction.

STATEMENT OF THE CASE

1. General Counsel's statement of the Board's findings of fact is erroneous in two instances, both of which are material.

(a) Page 2 of Petitioner's brief states "On January 6, 1960, after approximately 20 bargaining sessions, the Union accepted the terms of a contract proposed by respondent". The facts, as found by the trial examiner and set forth on Page 4, line 59 et seq. of the Intermediate Report and Recommended Order, and adopted by the Board are as follows: "at this meeting (February 4) the proposed contract was accepted by the membership" (Parenthesis added). There was no acceptance on January 6, 1960 (R. 62-63).

(b) Petitioner states at Page 3 of its brief "On February 12, respondent advised the union that it would not execute the contract . . ." Respondent's letter of February 12, 1960 (G.C. Exh. 2; [R. 71-72]) clearly contains an offer to execute the agreement.

The Board concluded, with the trial examiner, that respondent violated Sections 8(a)(1) and (5) of the act, holding that the acts of respondent constituted an unlawful refusal to bargain. Respondent believes a chronological statement of events will aid in clarifying the issues.

1. February 26, 1959: Charging Party Certified by Board.

2. March, 1959: Company-Union negotiations looking toward a first contract begun and continue for some 20 meetings thereafter.

3. January 6, 1960: Joint negotiation meeting.

4. January 18, 1960: Petition signed by large majority of employees, disavowing Charging Party submitted to Company.

5. January 21, 1960: Last Company offer voted on by respondent's employees, and rejected by vote (R. 58).

6. February 6, 1960: A second vote taken on Company's last offer, with only Union members voting (R. 61-63), and offer was accepted.

7. February 12, 1960: Joint meeting between Company and Union, the substance of which was notification by Union of acceptance and reply of Company, neither of which are contradicted (R. 71).

ARGUMENT

It appears too clear for serious question that as of February 12, 1960, 14 days before the 1st anniversary of the certification,

respondent was, as a matter of fact, still bargaining with the Union. Respondent's letter of that date (G. C. Exh. 2; R. 71) is clearly a bargaining proposal, made in good faith because of the intervening circumstance of the employee petition. There is no finding that respondent was not acting in good faith, as required by Section 8(a) of the act.

More important, there is no evidence that an impasse was reached with regard to the February 12 proposal of respondent, which in essence was a proposal concerning the term of the agreement, a legitimate and well recognized subject of collective bargaining. St. Joseph Stockyards Co., 2 NLRB 39. There is no evidence the Union rejected this offer, or that such rejection, if any, was ever communicated to respondent. The first notice to respondent was the filing of the charge.

Respondent contends, therefore, that it was still bargaining in good faith and no impasse existed as of the date of the filing of the Charge. If there is a failure and refusal to bargain, it lies with the charging party, who obviously abandoned its duty to bargain and sought refuge in the processes of the Board, seeking to shift the failure to bargain to respondent.

Even assuming, for the purpose of argument only, that respondent refused to bargain by its proposal of February 12, 1960, the finding of the Board that such refusal was unlawful is contrary to law.

Petitioner contends, with understandable reason, that Ray Brooks v. NLRB, 348 U.S. 96, overrules N. L. R. B. v. Globe Automatic Sprinkler, 199 F. 2d 64 (C. A. 3), for the Globe case is almost identical in fact to this proceeding, and squarely supports the action taken by respondent herein. Respondent believes that this court is able to determine whether Globe is overruled by Brooks. Respondent has been unable to find authority for this contention, and petitioner has supplied none.

Petitioner concedes that the Brooks case recognizes that what he refers to as the so-called one-year certification rule is not applicable where "unusual" circumstances are present. Respondent urges that the Brooks case pointedly avoids affirming any one-year rule as a rigid arithmetical test of good faith bargaining. Rather, the Brooks case affirms the test of "reasonable period", in the light of all of the facts obtaining, which accords with the reasoning of the Globe case.

The Globe case teaches that the facts of the instant case are "unusual circumstances" which terminated respondent's duty to bargain.

For the above reasons, it is respectfully submitted that the Board's conclusion that respondent unlawfully refused to bargain is not supported by the evidence and is contrary to law.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition be dismissed.

Respectfully submitted,

SWEENEY, IRWIN & FOYE

By: PETER W. IRWIN

Attorneys for Respondent
Holly-General Company,
Division of Siegler
Corporation.